

Subject: [Fwd: Re: comments on the Preliminary Report]
From: Dan Bockhorst <dan_bockhorst@commerce.state.ak.us>
Date: Mon, 30 Aug 2004 14:56:49 -0800
To: Judy L Hargis <judy_hargis@commerce.state.ak.us>
CC: Lorna J Mcpherren <jeanne_mcpherren@commerce.state.ak.us>

Judy: Please let me know if the latest submission of Ms. Fuller's comments (attached) appear to be formatted properly.

Subject: Re: comments on the Preliminary Report
From: Abigail Fuller <full7960@uidaho.edu>
Date: Mon, 30 Aug 2004 16:08:01 -0700
To: Dan Bockhorst <dan_bockhorst@commerce.state.ak.us>

Try this Word format. If that doesn't work I will print it out and fax it.
Abby

Dan Bockhorst wrote:

When we open the document you sent on 8/29, each apostrophe appears as "Ö" (see attachment). If you wish to modify or resubmit it, please do so prior to the September 2 deadline.

Abigail Fuller wrote:

Dan - attached in Rich Text Format are my comments on the Remand Preliminary Report. Please let me know if you have any trouble opening the file.

Abby

Re: comments on the Preliminary Report	Content-Type: message/rfc822 Content-Encoding: 8BIT
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fullercomments.doc	Content-Type: application/msword Content-Encoding: base64
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ABIGAIL FULLER'S COMMENTS ON THE REMAND PRELIMINARY REPORT

The Remand Preliminary Report does not address the issues before the LBC beyond brief lip service. It also cites the wrong set of regulations. The LBC's regulations were amended while Homer's proposal was being considered, but were not in effect until May of 2002. The regulations that were in effect for the LBC's decision on Homer's annexation can be found in the record at R 105 - 108 and R 137 - 139. The Balanced Best Interest standard was one of the regulations amended, and the Best Interest of the State standard was added to comply with state statute.

The issues before the LBC are:

1. What is the impact of annexation on KESA?
2. Given that impact, is the annexation in the best interests of the state?

The DCED has not analyzed the impact of annexation on KESA. It provides some statistics, admits there is an adverse impact, summarizes the comments (poorly) without any effort to actually consider them, and states that KESA is still viable. This is not enough.

Still being viable is not the same as no impact. The court did not tell the LBC to determine whether KESA was still viable, it told the LBC to consider the impact of annexation on KESA, then reconsider whether the annexation is truly in the state's best interest. This, contrary to the claims in the Remand Preliminary Report, is not the creation of a new standard. The court merely expects the LBC to follow both the standard as set by the LBC in regulation 3 AAC 110.140 and the statutory standard as established by the Leg. in AS 29.06.040(a). The reason a state-level commission was established for approving (or disapproving) boundary changes was to make sure the whole picture was considered, instead of decisions being based on the rose-colored view of the annexing city. By ignoring KESA, the LBC did not consider the entire picture.

The rest of the Remand Preliminary Report is simply not relevant to the issues before the LBC. The court has already determined that the creation of KESA is not at issue. The authority repeatedly cited for an alleged preference for cities over service areas pertains only to creation of service areas. It is not even a clear preference for cities as a preexisting service area can also be preferred over the creation of a new service area. The DCED's position is a misinterpretation of the law. Even if it were correct, it applies only to creation of a service area which is not at issue.

This Remand Preliminary Report needs to go back to the drawing board. If Mr. Bockhorst cannot get beyond his own opinions and feelings to write an objective report on the issues before the

LBC then perhaps the job should be assigned to someone else.

Because there is no meat in the DCED's diatribe, my comments are in response to Homer's and Waring's comments on the remand. I also incorporate by reference CCAA's Comments on the Remand Preliminary Report.

RESPONSE TO KEVIN WARING'S COMMENTS

Mr. Waring¹ claims that there was ample reason to find that annexation is still in the state's best interest despite any impact on KESA, if they had considered the issue. Some of his listed reasons have been upheld by the court, but some are in error.

- The post-annexation population of Homer is not "much greater than" the post-annexation population of KESA. According to staff the post-annexation population of KESA is 4134, and Homer's post-annexation population is 4844. (Remand Preliminary Report p. 83, and R 3368 (Decision).)
- The Alaska Constitution does not have a blanket preference for cities over service areas as he implies, rather there is a restriction on formation of service areas that in narrow circumstances favors a city over a service area. However, he also admits that the formation of KESA is not at issue (see fnnt 2 of his comments).
- While KESA did contract with Homer, Mr. Waring was apparently unaware that KESA was also expanding and improving services independently of Homer.² The impact on KESA is not whether it can deliver services but how much service it can deliver.
- All options for delivery of services involve changes to either the level of service delivered or the tax burden, both of which affect the state's interest.
- KPB did not concur in the transition plan. KPB expressed concerns about the transition plan, which, among other things, did not address KESA at all, but politely said an agreement could probably be worked out. (Tr. 53-58 (12/14-15/01).)

The legal issues that Mr. Waring brings up do not hold water, but are not relevant to this remand discussion. I will be happy to argue these issues before the court should the LBC wish to appeal, but chose not to do so here.

RESPONSE TO CITY OF HOMER'S PUBLIC COMMENTS (6/24/04)

¹ The *former* Chair is former because the Governor felt it was in the state's interest to replace him. His comments do not deserve the great weight given them by Dan Bockhorst. He is merely trying to justify the decision he made, which the Court has found lacking.

² This may have been because of staff's filtering efforts. Ample evidence of planned improvements were provided to staff but very little made it into the record.

(Homer filed two sets of comments. I will refer to the first set, filed during the public comment period, as Homer Comments, and the second set, filed 7/12/04 as a reply to the public comments, as Homer Remand Reply.)

The primary purpose of these comments seems to be an attempt to introduce evidence that postdates the LBC's cutoff date. I did not object to that cutoff date because it was rational, and the only other rational possibility was to allow information up to the present. But whatever KESA has done since annexation does not help determine the impact, because regardless of what KESA has done, it could have done much more without the loss of tax revenue. What that would have been is just as speculative now as it would have been on January 17, 2002. I trust the LBC will not bend the rules on the city's behalf, and will ignore the submitted material that postdates the established cutoff date.

The viability of KESA is not the issue, rather the impact is to be assessed and then applied to the assessment of the state's interest. Homer has provided tax assessment figures that do not agree with the ones the KPB provided to me, but that is because Homer did not ask for the same data. The figures provided to me (and used in CCAA's comments) reflect the pre-annexation tax base of KESA as of January 1, 2002. Homer has used 2001 figures. The difference is Millers Landing which, having been left out by mistake, was added to KESA effective 1/1/02. Without annexation Millers Landing would remain part of KESA and so the loss of Millers Landing must be included in any assessment of the impact of annexation.

Homer goes on to claim that KESA can adjust to annexation: I address that argument in my response to Homer's Reply, below. Homer then focuses on the needs in the annexed area. This myopic view cannot be used to assess the state's interest. The state's interest is the area-wide or statewide effect of annexation, which is why the LBC was created to decide boundary issues rather than leave them up to municipalities.

KPB did not openly oppose annexation because of politics, which do not usually create proper boundaries. (Remand Preliminary Report, p. 15, citing *Fairview*.) Homer city manager Ron Drathman, author of the city petition, was the President of the KPB Assembly when he accepted the job as city manager, a few months before starting work on Homer's annexation petition. (R 1165.) Drathman had connections and he used them. The annexation was opposed by KPB Mayor Bagley, although he did not submit comments, and by the area's assembly member Milli Martin. (R 207, R 3043-48, Tr. 125-132, Tr. 170-171 (12/14-15/01).) KESA, as the LBC keeps pointing out, did not have the legal authority to oppose annexation on its own behalf, but board members Mary Griswold and Lee Krumm opposed it as individuals. (Mary Griswold at R 384-401, R 2817-2820, Tr. 94-101, Tr. 313-316 (12/14-15/01).)

Homer tries to claim that the state interest favors healthy cities. Actually, the state interest favors boroughs, cities were allowed only to accommodate political realities. It was intended that cities be a part of the borough and they would cooperate, which unfortunately has not happened. The state may have an interest in the city being financially strong so it can provide services, but it also has an interest in the borough being able to provide services, in this case through a financially strong service area. Taking from one to give to another is not in the state's best interest when the entire picture is viewed objectively.

RESPONSE TO HOMERS REPLY COMMENTS

Homer contends that the inclusion of the area annexed in KESA was “an unwise choice from the start”. KESA was created before the [annexation] Preliminary Report was released, which recommended only 3.3 square miles. The exact boundary of the area annexed was not established until Dec 15, 2001, over a year after KESA was created. The organizers of KESA and the KPB assembly did the best they could but they are not clairvoyant. It was not possible to know what, if anything, would get annexed. The only rational choice was to include all the territory outside of city limits that could be served by an area fire department.

Homer argues that annexation better serves the needs of the approximately 900 people who were annexed. This is what the LBC found, as upheld by the court, so it really is not arguable here; but it is also beside the point. Homer is, as the LBC did in its decision, ignoring the needs of the 4000 or so people remaining in KESA. The city cannot provide to KESA the broad range of city services it offers to its residents, nor do the KESA residents need all of those city services. This too is established by the LBC's decision as upheld by the court. It is easy to say annexation is better when myopically viewing only the 4.58 square miles approved for annexation, but that is not the issue before the LBC. The issue is what is in the State's best interest, which means all of the people, not just 900.

Homer may well not have intended to harm KESA when it annexed just the high value portion. But it is still cherry-picking to take only the tax-rich territory while leaving the rest to fend for itself. The impact on KESA is the same regardless of motive. While it is true that any removal of property from a service area will decrease its tax base, there is a gross disproportion here between the reduction in service needs and the reduction in tax base. If the service area's responsibilities were reduced by 50% it would not create an adverse impact to remove 50% of its tax base. But when only 2% of its area, the part least in need of improved services, takes away 25% of its tax base that does cause a serious impact on the remaining portion of the service area.

The city claims that it is more efficient for it to serve the areas near the city core while KESA focuses on the rural areas. Because KESA contracts with the city for services the city can provide, this really has nothing to do with annexation, the city serves the annexed area one way or the other. Homer gets tax revenue to provide the services to the annexed territory either through KESA (if not annexed) or by direct taxation. Given all of the other services that cry out for Homer tax dollars, the area may reasonably be expected to get more emergency services for its buck through KESA than direct from Homer. Further, the loss of tax base from annexation *reduces* KESA's ability to enhance the rural services that Homer suggests it should focus on.

Homer, in its response to KPB Mayor Bagley, suggests that KESA can raise its mill rate. It does not explain how raising people's taxes is in the State's interest, given that the State's interest is the same as the people's interest. Having to raise taxes to provide the same level of service is NOT the efficient and cost effective provision of public services, which is the heart of the State's interest. Homer's argument can be summed up as "we don't care what the impact on KESA is because the borough can handle it." That was the the LBC's response to Judge Rindner at oral argument and he didn't buy it.

Homer's response to CCAA turns the analysis on its ear. The benchmark for who is taking money away from whom is the status prior to annexation. When the post annexation tax bases of both Homer and KESA are compared to the pre annexation tax bases, Homer is taking money from KESA, not the other way around. Homer would like this remand to be a fresh look, starting from the present day and looking forward to undoing the annexation, but it is not. The LBC has already established that it will be looking ahead to annexation's impact on KESA from the viewpoint of 1/17/2002. Homer seems to think it has some god-given right to the territory around it just because it meets the annexation standards. BUT annexation must also be in the state's interest, and the state's interest includes the broad view, what is best for the greater area not what is best for Homer or what is best for 4.58 square miles.

Homer also forgets that some of KESA's efforts at improving services were focused on improving services to ALL - including Homer. (See KESA Comprehensive Plan and KESA minutes, the former submitted with CCAA's comments and latter submitted with Homer's comments.) Certainly KESA could make some reduction in its budget by focusing solely on the needs of the rural areas further from Homer and NOT making the improvements that benefit both KESA and Homer, but that would be a loss to all and is certainly not in the state's interest.

The city says that the LBC must, to consider the impact of annexation on KESA, also consider the converse. That would be KESA's impact on the annexation proposal, not, as the city suggests, the "impact" on Homer of not annexing. Maintaining the status quo can never be

described as an “impact.” One of the considerable impacts on Homer that the LBC used to justify its decision was the lack of fire and emergency services to Miller’s Landing, but the addition of that area to KESA solved the problem. The effect of KESA on the city of Homer was to relieve Homer of the greatest part of the burden it complained of, namely the provision of emergency services to the outlying area without compensation. This reduces the State interest in favor of annexing while the impact on KESA is a State interest against annexing.

The other significant burden claimed by the LBC as reason to annex was pure speculation and should not be given great weight in reconsidering the best interest’s of the state. That would be a speculative need for city water and sewer, as there was no actual evidence of any such need, nor was any evidence provided that the city could provide it. While the court accepted this part of the LBC’s decision, a speculative need for 900 people should not outweigh an acknowledged and vital need for 4000 people.

Homer is awfully quick to suggest that the borough raise KESA’s taxes for a city that refused to consider raising its own taxes to solve its budget woes. (R 1299.) What is good for the goose is good for the gander, and vice versa.

Homer also suggests that the way to deal with KESA’s reduced ability to respond quickly to wildfires, a response that potentially saves the State millions, is best dealt with by *increasing* State spending on wildfire suppression! And just how is having to increase State spending to compensate for Homer’s annexation in the State’s interest? Annexation is presumed to be in the State’s interest when it *reduces* the burdens on the State, so an *increase* in the burden on the State must therefore not be in the State’s interest.

When comparing who has what money at stake Homer forgot to factor in the 1 mill of road service area taxes that is being diverted from the borough to the city. The city also exaggerates its financial position without the annexed area. The LBC found that the city was quite healthy financially. (R 3371.) What the city “loses” if it cannot annex is also offset by its reduction in responsibility for providing fire, emergency, and road maintenance services to the territory. If lack of annexation really would hurt the city as badly as it claims, it could shift some of its responsibilities to the borough. It could, in fact do what Soldotna did and join KESA, transferring its fire department to the borough. This transfer of responsibilities from city to borough is provided for by the Alaska Constitution. Homer’s argument merely makes clear that they annexed for the money, which is not a valid reason for annexation.

CONCLUSION

Staff should take its time on the Final Report and do what should have been done for the Preliminary Report; actually assess the impact on KESA, then weigh whether annexation is really in the State's Best Interest. Staff should find that there is a serious impact on KESA and that the impact swings the balance away from the State's interest.